



Hidden Money:

The Need for Transparency in Political Finance

The Committee for Economic Development Subcommittee on Money in Politics

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Public disclosure of the financial activity that takes place in election campaigns is a requisite of a healthy democracy and a cornerstone of our campaign finance system. When Congress reformed campaign finance law in response to the Watergate scandal, one of its principal objectives was to eliminate the use of secret political funds by making the financial transactions in elections transparent. The Watergate investigations had uncovered a number of undisclosed funds connected to President Nixon's 1972 reelection campaign. These funds had taken in millions of dollars, including illegal cash contributions and corporate donations, which were used to finance unethical and illegal activities.¹ Congress quickly took action to address this problem by adopting the Federal Election Campaign Act (FECA), which included mandatory disclosure rules for monies raised and spent by federal candidates, parties, and political action committees, and required that these disclosures be reported to the Federal Election Commission and made available to the public. In this way Congress sought to provide citizens with information about the sources of support for candidates and political committees and safeguard the political process from the corrupt or improper influence of undisclosed contributions.

In the decades following the adoption of the FECA, disclosure was widely accepted as a necessary component of financial regulation, drawing support from both sides of the political aisle. But in recent years, this consensus has broken down, as partisan groups have pursued new ways of keeping their political spending secret. Consequently, much of the money spent in connection with federal elections is hidden from public view. In the 2010 elections, tens of millions of dollars in political spending was not disclosed to the public. Millions more were reported without identifying the donors behind the expenditures made. As a result, the amounts of undisclosed money now flowing into federal elections dwarf the sums found in the secret funds that led to the Watergate scandal and the subsequent decline in public confidence in the electoral process.

A well functioning democracy should not work this way. Transparency is an essential principle of free and competitive markets; it is equally important in a system of free and competitive elections. The money raised and spent to influence voting decisions and election outcomes should be subject to public scrutiny. CED believes that the use of hidden money in elections undermines First Amendment guarantees and is contrary to the basic values of our democracy. Reform is urgently needed to bring these funds to light.

The Growth of Hidden Money

In 2010, organized groups, not including party committees,

reported \$298 million in spending to the Federal Election Commission (FEC), or more than four times the amount reported in the 2006 midterm.² Yet this impressive sum represented only a portion of group spending on election-related activities. For example, tax-exempt nonprofit organizations that operate under Section 501(c) of the income tax code may spend money on political activity as long as these activities are not their "primary purpose." Such groups include nonprofit social welfare corporations, trade associations, and labor unions. However, under current federal disclosure rules, these organizations only have to disclose the amounts they spend independently on activities that expressly advocate the election or defeat of a federal candidate or on messages that qualify as "electioneering communications," which are broadcast advertisements featuring federal candidates that are aired within thirty days of a primary or sixty days of a general election. They do not have to disclose any money spent on ads that do not feature a candidate (for example, advertisements devoted to advocating a position on a particular policy issue) or on ads that are broadcast outside of the time periods applied to electioneering communications. Furthermore, monies spent on direct mail, telephone canvassing programs, internet communications, voter registration and voter turnout typically do not have to be publicly disclosed so long as they do not expressly urge a vote for a particular candidate.

Given the limited scope of current disclosure law, nonprofit groups, trade associations, labor unions, and corporations can spend large sums on election efforts without having to disclose their expenditures. The total amount they allocate to politicking is therefore impossible to accurately discern. In 2010, the total was certainly well beyond the approximately \$300 million they reported in disclosure filings. In fact, the best available estimate suggests that it was much more. Based on patterns in previous elections and a review of IRS filings, public statements, and anecdotal accounts, the nonpartisan Campaign Finance Institute estimated that these entities may have spent as much as \$564 million on congressional elections in 2010, or almost 90 percent more than the total determined from FEC filings.³ This compares to an estimated \$397 million in total spending on congressional elections in 2008 and \$223 million in 2006. These figures indicate that campaign spending by organized groups is rising rapidly and much of this spending is carried out in ways that allow these organizations to evade public disclosure.

The Return of Secret Donors

While the problem of undisclosed money existed before the 2010 election, it has been exacerbated by new develop-

ments. In recent years, the FEC, the agency responsible for implementing campaign finance law, has eviscerated the disclosure regulations applied to campaign advertising, making it easy for groups to avoid disclosing their donors. Although federal law requires public disclosure of any donor who gives \$1,000 or more to a group to further the financing of electioneering communications, the FEC in 2007 adopted a rule to require donor disclosure only if a donor “specifically designates” a contribution to be used to pay for an election ad. This rule has further been interpreted as requiring donor disclosure only if a contributor specifically designates a contribution to pay for the airing of a particular ad.⁴ Given that most ads are created after the money is raised—in fact, most election expenses are decided after the money is raised—this effectively means that the Commission no longer requires donor disclosure in most instances.

These regulatory decisions have had a devastating effect on the efficacy of disclosure rules. In 2010, close to half of the \$298 million in spending disclosed by organized groups did not include information about their sources of funding.⁵ An analysis of FEC reports conducted by Public Citizen, a public interest group, detailed the extent to which groups evaded donor disclosure.⁶ The study found:

- Of 308 outside groups, excluding party committees, that reported spending money on the 2010 elections, only 166 (53.9 percent) provided any information about the sources of their funding.
- Of the top 10 groups in terms of spending, only three provided information about their funders. These groups, which collectively spent \$138 million in 2010 or almost half of the total amount reported, disclosed the sources of only one out of every four dollars they spent.
- Of the 53 groups that reported making electioneering communications in 2010, only 18 (34 percent) disclosed the donors who financed their advertising. This reflected a significant difference from 2006, when 30 of the 31 groups (97 percent) that financed electioneering communications disclosed their sources of funding.
- The ten groups that spent the most on electioneering communications spent a total of \$63.5 million on advertising, but disclosed the sources of only one out of every ten dollars spent.
- Groups that failed to disclose any information about their funders collectively spent \$135.6 million, which was almost double the amount spent by all groups (\$69 million) active in the 2006 midterm election.

Disclosure by Groups Making Electioneering Communications, 2004-2010

	# of Groups Reporting ECs	# of Groups Reporting the Donors Funding ECs	Pct. of Groups Reporting the Donors Funding ECs
2004	47	46	97.9
2006	31	30	96.8
2008	79	39	49.3
2010	53	18	34.0

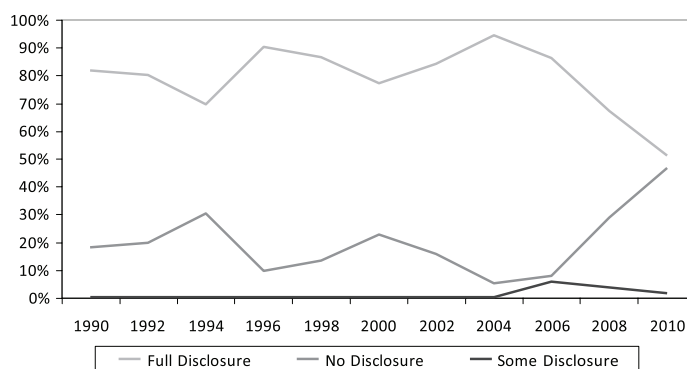
Source: Public Citizen analysis of FEC data.

Disclosure by Top Spending Electioneering Communications Groups, 2010 Election Cycle

Group	Electioneering Communications Expenses	Contributions Reported
U.S. Chamber of Commerce	\$31,207,114	\$0
American Action Network Inc.	\$16,364,625	\$0
Americans for Job Security (AJS)	\$4,598,520	\$0
Center for Individual Freedom	\$2,500,617	\$0
American Future Fund	\$2,219,776	\$0
Citizens for Strength and Security	\$1,403,110	\$5,752,000
CSS Action Fund Inc.	\$1,391,880	\$0
Arkansans for Change	\$1,335,073	\$0
Americans for Prosperity	\$1,311,631	\$1,000
Campaign Money Watch	\$1,174,718	\$1,125,000
Total	\$63,507,064	\$6,878,000

Source: Public Citizen.

Donor Disclosure of Outside Spending, 1990-2010



Source: Center for Responsive Politics.

As these findings illustrate, the FEC’s actions have eviscerated the electioneering communications disclosure requirements that were adopted only a few years ago as part of the 2002 Bipartisan Campaign Reform Act (also known as McCain-Feingold). Groups are now capable of spending millions of dollars on campaign ads without having to disclose where their money comes from. Since many of these organizations have generic sounding names, such as Americans for Prosperity, American Action Network, and American Future Fund, citizens cannot be expected to know the interests behind their efforts without effective

donor disclosure. Recent developments have thus served to reverse decades of improvement in financial transparency and have put the nation on a track that encourages more and more of the money being spent in elections to move into the dark.

Ensuring Transparency

American corporations offer a level of disclosure of their financial transactions that is found nowhere else in the world. Publicly held corporations must abide by stringent regulations that require regular reporting, subject to audit. This disclosure and the transparency it facilitates are essential to a properly functioning market. Markets work best and most efficiently when the financial transactions that take place within them are publicly disclosed.

CED strongly believes that disclosure and transparency are essential to the proper functioning of our democracy and economic system. Key constituents of companies, unions, or other organizations—whether they be shareholders, owners, organizational members, consumers served, or communities served—need to know how the funds in which they have a financial interest are being spent if they are to make informed political and economic decisions. Disclosure encourages political contributors and spenders to look beyond their immediate political goals when considering the potential consequences of their actions. Disclosure is a necessary safeguard against corruption in the political process, since it helps to reduce excesses and promotes full public scrutiny of financial transactions. It also facilitates enforcement of the law. Most important, disclosure promotes a more informed citizenry by providing information that allows citizens to fully assess election messages that seek to influence their decisions.

The value of disclosure in our electoral system has been noted time and again by the Supreme Court. The Court has consistently upheld campaign finance disclosure and disclaimer requirements, even in those instances when other provisions of law were deemed unconstitutional. For example, in *Citizens United*, the Court supported the disclosure of independent expenditures and electioneering communications by an 8-1 vote, even though it struck down the prohibition on the use of corporate and labor treasury monies to pay for such ads. In rendering this decision, the Court noted that independent groups were running election-related advertisements “while hiding behind dubious and misleading names” and that “the public has an interest in knowing who is speaking about a candidate just before an election.” The Court declared that this public interest was served by disclosure rules, since they help citizens “make informed choices in the political marketplace.”⁷

Similarly, in *Doe v. Reed*, a 2010 case involving a challenge to the disclosure of the names and addresses of individuals who signed a ballot petition, the Supreme Court strongly supported disclosure, with only one justice dissenting. In rejecting the challenge, Chief Justice Roberts noted that public disclosure “promotes transparency and accountability in the electoral process to an extent other measures cannot.”⁸

The benefits of disclosure were clearly summarized by Justice Kennedy in the majority opinion in *Citizens United*:

With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advanced the corporation’s interest in making profits, and citizens can see whether elected officials are “in the pocket” of so-called money interests.

The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.⁹

We share this view. Indeed, we find the recent FEC actions to be particularly egregious because they are at odds with the high court’s affirmation of the importance of disclosure. Instead of promoting transparency, the agency has added a new element of secrecy in campaign finance and sanctioned practices that were not intended by Congress when they expanded the disclosure rules less than a decade ago.

We believe that the basic principle of transparency that is applied to corporate finances should also be applied to the financial transactions that take place in election campaigns. In our view, any group or organization that spends money to support candidates or finances election campaign activities should be required to disclose their expenditures and sources of funding to the public. Congress should make clear that both expenditures and any contributions or receipts that may be used to finance campaign expenditures should be disclosed by those who finance election activity, regardless of the type of organization involved. The law should also be reformed to encompass disclosure of electioneering activities that are not covered by the current electioneering communications regulations, including election-related activities such as non-broadcast communications, voter registration and voter turnout expenditures.

We agree with Justice Roberts’ conclusion that disclosure promotes transparency and accountability in the electoral process to a greater extent than any other regulatory

approach. We also support disclosure because it offers an equitable approach to the secrecy problem that plagues our current system. Any organization—whether a tax-exempt political committee, nonprofit social welfare organization, trade association, labor union, or for profit publicly held or privately held corporation—should be subject to the same rules and obligations to make their campaign finances transparent. Comprehensive public disclosure treats all of those who raise and spend money on election activity in the same manner. It provides an across-the-board corrective equally applicable to any actor in the electoral process.

We recognize that many of the organizations involved in electoral politics have other purposes as their primary concern. For most, participation in election campaigns is but one of the many things they do. We also understand why some organizations may be hesitant to have to disclose all of their donors and spending, since in some cases most of the money they raise and spend is used for purposes other than electioneering. But that is not what we are calling for here. We believe that disclosure should apply to the monies raised and spent to influence elections. One way organizations could meet this requirement is to establish separate bank accounts or funds for political activities, and report the transactions that occur in this segregated political fund. While such a disclosure requirement would entail additional administrative costs beyond those necessitated by current law, we feel any such costs are a justified and reasonable expense as compared to the benefits offered by such a requirement.

We also recognize that public disclosure may pose some risk of consequences for some donors or some spenders. Some individuals may face criticism for their political actions or contributions to particular organizations. Some may also fear “payback” from elected officials in those instances where groups or donors have supported their opponents. In our view, such concerns do not justify anonymity in political campaigning. Moreover, the courts have established a legal remedy for those peculiar circumstances in which exemption from disclosure or a need for anonymity may be warranted. An individual or group may be exempted from otherwise valid disclosure requirements in instances where they can demonstrate a “reasonable probability” that required disclosure would result in “threats, harassment, or reprisals from either government officials or private parties.”¹⁰ Accordingly and only in these specific circumstances, the Supreme Court has exempted individuals or groups from disclosure requirements, including federal campaign finance disclosure laws.¹¹ We believe that this approach ensures the benefits of disclosure, while offering safeguards against consequences that are legitimate concerns in assessing the effects of mandatory disclosure laws.

We strongly urge Congress to pass legislation that provides for timely, comprehensive public disclosure of the sources of funding and monies spent by any organization that finances election activities.

Conclusion

The 2010 elections were characterized by an unprecedented amount of undisclosed money from secret donors. We believe that this will be an even greater problem in the future. Current practices have established a path that will lead to less transparency and more hidden money. Now that groups have demonstrated that they can keep their sources of funding secret without the risk of an enforcement action being brought against them by regulators, it is a certainty that more groups will follow this course. Consequently, more undisclosed money will flow into our elections. More donors, including those who give large sums, will remain secret. More advertising and electioneering will be carried out with the public having little knowledge of the interests behind these efforts. This lack of transparency poses a grave threat to our democracy. It serves to undermine public confidence in our electoral system. It heightens the risk of corruption. And based on past experience, it will inevitably lead to a future scandal. Reform is urgently needed to ensure that all monies raised and spent on election campaigns are fully disclosed to the public.

Notes (Endnotes)

- 1 Herbert Alexander, *Financing the 1972 Election* (Lexington, Massachusetts: D.C. Heath and Company, 1976), pp. 49-54.
- 2 Megan R. Wilson, "Who's Buying this Election? Close to Half the Money Fueling Outside Ads Comes from Undisclosed Donors," OpenSecrets Blog, November 2, 2010, <http://www.opensecrets.org/news/2010/11/whos-buying-this-election.html> (accessed March 23, 2011).
- 3 Campaign Finance Institute, "Election-Related Spending by Political Committees and Non-Profits Up 40% in 2010," press release, October 18, 2010, <http://www.cfinst.org/Press/PReleases/10-10-18/Election-Related-Spending-by-Political-Committees-and-Non-Profits-Up-40-in-2010.aspx> (accessed July 30, 2011).
- 4 Paul S. Ryan, "Citizens United and the 'Effective Disclosure' System That Wasn't," Campaign Legal Center Blog, January 24, 2011.
- 5 Megan R. Wilson, "Who's Buying this Election? Close to Half the Money Fueling Outside Ads Comes from Undisclosed Donors," OpenSecrets Blog, November 2, 2010, <http://www.opensecrets.org/news/2010/11/whos-buying-this-election.html> (accessed March 23, 2011).
- 6 Public Citizen, *Disclosure Eclipse*, November 18, 2010, <http://www.citizen.org/documents/Eclipsed-Disclosure11182010.pdf> (accessed March 23, 2011).
- 7 *Citizens United v. Federal Election Commission*, 130 S. Ct. (2010), p. 914.
- 8 *Doe v. Reed*, 561 U.S. ____ (2010) (Slip Opinion, p. 9).
- 9 *Citizens United*, p. 916.
- 10 *Buckley v. Valeo*, 424 U.S. 1 (1976), p. 74.
- 11 See, for example, *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449 (1958) and *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982).



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